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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUFUS E. CUNNINGHAM, *Petitioner,*

vs.

COUNTY OF LOS ANGELES, et al., *Respondents,*

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE "BALANCE OF EQUITIES" IS NOT A "SPECIAL CIRCUMSTANCE." 1-2

II. THE ACTION OF THE COURT OF APPEALS MAY NOT BE JUSTIFIED BY ITS WITHDRAWN AMENDED OPINION. 2-3

III. CUNNINGHAM AND BORUNDA ARE DIAMETRICALLY OPPOSED IN THEIR VIEW OF WHAT CONSTITUTES A "SPECIAL CIRCUMSTANCE.". 3-4

IV. THE DISTRICT COURT DID NOT JUST REDUCE THE FEES TO MATCH PETITIONER'S "LIMITED" SUCCESS. 4-6

V. RESPONDENT'S OPPOSITION EXEMPLIFIES WHY THIS COURT SHOULD GRANT CERTIORARI. 6-7

TABLE OF AUTHORITIES

Cases: Page

Borunda v. Richmond,
___ F.2d ___ (9th Cir. 1989),
89 Daily Journal D.A.R. 11494 3, 6

City of Riverside v. Rivera,
477 U.S. 561 (1986) 3

Hensley v. Eckerhart,
461 U.S. 424 (1983) 4

New York Gaslight Club, Inc. v. Carey,
447 U.S. 54 (1980) 6

Oliveri v. Thompson,
803 F.2d 1265 (2d Cir. 1986) 3

Pavelic & Leflore v. Marvel Entertainment Group,
___ U.S. ___ (December 5, 1989) 6

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 7

Statutes:

Page

United States Code
42 U.S.C. § 1988 5

Rules of Court:

Federal Rules of Civil Procedure
Rule 11 3

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I.

THE "BALANCE OF EQUITIES" IS NOT A "SPECIAL CIRCUMSTANCE."

Respondent correctly acknowledges that attorney fees must be awarded a prevailing civil rights plaintiff absent special circumstances. But the argument that mere reference to the supposed "balance of equities" satisfies the special circumstances requirement is illogical and unreasonable. A court must always balance equities; there is nothing "special" about it. One could "balance equities" and find public interest organizations should not be awarded fees, or a defendant's good faith is important, or the recovery of a large damage award precluded fees, or a contingency fee arrangement renders the award of fees

unnecessary--all of which are not special circumstances and do not permit the denial of fees.[1] A "balance of equities" test is not sufficiently specific to be of any use. One may as well say, "a court is required to award fees unless it does not want to."

II.

THE ACTION OF THE COURT OF APPEALS MAY NOT BE JUSTIFIED BY ITS WITHDRAWN AMENDED OPINION.

Implicitly recognizing the circularity of its argument, Respondent misstates the record and seeks to defend what the Ninth Circuit has already abandoned.

The Ninth Circuit's refusal to award fees on appeal was not based on a determination in an "unpublished order" that Petitioner's trial counsel had engaged in "unethical conduct" which petitioner is "conveniently ignoring" in an effort to "mislead the court." (Brief in Opposition, page 5.) The "order" to which Respondent refers was a portion of the Circuit's Amended Opinion withdrawn after Petitioner's Second Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. The March, 1989, Opinion is not "unpublished"; it is found at 869 F.2d 427. Petitioner did not "ignore" the withdrawn portion of the Ninth Circuit's Amended Opinion; he made explicit reference to this untenable, abandoned ground at Petition for Certiorari, page 6, footnote 6 (as did Amicus Curiae at Brief in Support of Petition page 4, footnote 3).

It is Respondent who misstates the record, by

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[1] See Petition for Certiorari pages 7, 8, 9.

representing that Petitioner's claims against the County of Los Angeles, Sheriff Block and Sergeant Brusby were "frivolous," and by claiming that trial counsel engaged in "conduct that may even have subjected [him] to . . . Rule 11 sanctions." (Brief in Opposition, pages 2, 3.) The Ninth Circuit held Petitioner's claims were not frivolous and that Counsel committed no Rule 11 violation. (Opinion below, Appendix pages A-33, A-35.) The Second Circuit has likewise held that naming the public entity and its chief is proper. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom., County of Suffolk v. Graseck*, 480 U.S. 918 (1987). This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 570, 571, recognizes the need to name all potential defendants. Naming these defendants "comports with the dictates of this Court as well as the custom and practice of civil rights lawyers in the greater Los Angeles area . . . ." (Police Misconduct Lawyer Referral Service Motion for Leave to File Amicus Curiae Brief, page 4, footnote 3.)

III.

CUNNINGHAM AND BORUNDA ARE DIAMETRICALLY OPPOSED IN THEIR VIEW OF WHAT CONSTITUTES A "SPECIAL CIRCUMSTANCE."

It is not enough that both *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1989), and *Cunningham* recognize that fees may be denied only if "special circumstances" exist and stop there, as does Respondent. The *Cunningham* court pays lip service and nothing more to this Court's "special circumstances" requirement by allowing denial of fees because of the alleged "balance of equities." *Borunda*, on the other hand, took this Court's long established, oft repeated and carefully articulated requirements seriously.

It recognized that there are practically no circumstances sufficiently special to warrant denial of fees and, implicitly, that an alleged "balance of equities" would not be among them.

Cunningham mouths the words "special circumstances," and then fabricates an exception that swallows up the rule: Fees must be awarded absent "special circumstances," except where the "balance of equities" (no need to explain how) does not require such an award. If *Cunningham* is allowed to stand, this Court's efforts to establish understandable rules capable of being applied cost effectively in an even handed, fair manner will be undermined. Every litigant and many courts are likely to see the "equities" differently. There will be increased and unproductive attorney fee litigation, consuming ever more judicial resources.

IV.

THE DISTRICT COURT DID NOT JUST REDUCE THE FEES TO MATCH PETITIONER'S "LIMITED" SUCCESS.

Petitioner acknowledges that fees may be reduced for "limited" success. Were this what occurred, Petitioner would not be petitioning this Court.

This Court in *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." The Court stated that "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested."

Petitioner prevailed against three of seven defendants. It was no coincidence that the district court, refusing to give Petition a breakdown, cut the lodestar to exactly 3/7 of the time expended. *Hensley* expressly disapproved this meat cleaver method. Lower courts should follow the precedents of this Court.

Trial counsel's itemized time records clearly showed approximately ten percent of his time was spent on the four defendants against whom Petitioner did not prevail. A ten percent cut would have been arguably correct; any cut beyond that simply and inappropriately punished Petitioner and his trial counsel.

After trial, Petitioner got more than ten times any pre-trial settlement offer. In the real world of civil rights litigation, where it is difficult to obtain any redress at all for those who are wronged by the "minor" indignity of commonplace unlawful arrests and trips to the station house, this is a victory. Petitioner's success in proving defendants' conduct in violation of the United States Constitution triggered Respondent's obligation to pay attorney fees. In the Attorneys' Fee Act of 1976, Congress recognized that requiring the payment of fees is the only way that such wrongs may be redressed.

The courts below are guided by a different star. They are hostile to the prosecution of civil rights violations and do not want to encourage litigants or attorneys to bring such suits by paying them enough to make it possible.

If judicial economy is a goal, then defendants who needlessly consume scant judicial resources by refusing to

fairly and quickly resolve meritorious federal civil rights claims should pay the costs.

V.

RESPONDENT'S OPPOSITION EXEMPLIFIES WHY THIS COURT SHOULD GRANT CERTIORARI.

Respondent's arguments as to what the Ninth Circuit Opinion means demonstrate its dangers.

Respondent argues that Petitioner's counsel were properly denied fees for work successfully performed to punish them for trial counsel's supposed transgressions.

Clearly, the district court's punitive refusal to award the fee trial counsel earned and the Court of Appeals' punitive refusal to award either fees or costs for the successful work of appellate counsel run totally against established law. Counsel did nothing contrary to the accepted practice of civil rights lawyers, let alone anything frivolous, unethical or improper. The discretion to deny fees to a successful civil rights plaintiff is exceedingly "narrow" and circumstances justifying denial "'extremely rare.'" *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 68 (1980); *Borunda v. Richmond*, 885 F.2d 1384, 1392 (9th Cir. 1989). So also is a court's right to impose punishment--whether it be upon counsel or anyone else--for the supposed transgressions of counsel. *See, e.g., Pavelic & Leflore v. Marvel Entertainment Group,* ___ U.S. ___, (December 5, 1989).

This Court should not authorize the withholding of earned fees for the purpose of punishing a prevailing civil

rights plaintiff for the alleged,[2] undefined[3] transgressions of his or her lawyer. Respondent's argument before this Court claiming that this is what happened here shows how *Cunningham v. County of Los Angeles* will be used in the future.

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[2] There was, of course, never any notice to either petitioner or his trial or appellate counsel that either the district court or the Court of Appeals was considering reduction or denial of fees for work successfully completed because of trial counsel's supposed "unethical" conduct. For the obvious due process problem which this involves, see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980).

[3] Since the final *Cunningham* opinion makes no reference to the actual basis for punishing petitioner and his trial and appellate counsel, *Cunningham* may be used for the proposition that such punishment (reducing or denying fees) may be meted out without explanation, notice, or hearing.